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Brief of Matter for P. E.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

21

T. H. RHODES,
Plaintiff in Error,
vs.
THE STATE OF IOWA,
Defendant in Error.

In Error to the Supreme Court of Iowa.

ARGUMENT FOR PLAINTIFF IN ERROR.

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The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

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STATEMENT.

On the 4th day of August, 1891, the Dallas Transportation Company delivered to the Chicago, Burlington and Quincy Railroad Company, at Dallas, Illinois, for transportation to Brighton, Iowa, a wooden box, which was represented to contain groceries, but which actually contained a jug of intoxicating liquor. The railroad company received the box and receipted for it as a through shipment, carrying the same on a through bill of lading reading from Dallas, Illinois, to Brighton, Iowa, over the lines of the Chicago, Burlington and Quincy Railroad Company from Dallas, Illinois, to Burlington, Iowa, and from the latter point to Brighton, Iowa, over the line of the Burlington and Western Railroad Company. The latter company carried the box to its destina-

tion under said original consignment, and it was delivered at Brighton, Iowa, on the platform on the outside of the Burlington and Western depot by the trainmen of the last named company on August 5, 1891. The plaintiff in error was the station agent of the Burlington and Western Railroad Company at Brighton. Immediately after the placing of the box on the platform by the trainmen, the plaintiff in error, complying with the directions of his employer, carried the box across the platform, a distance not to exceed six feet, and placed it within the depot building at the Brighton station. About one hour later the box was seized by a constable under a search warrant issued by a justice of the peace on an information filed before him that intoxicating liquors improperly marked were in said depot building. As a result of subsequent proceedings before the justice of the peace, the liquor was condemned as intoxicating and destroyed.

The plaintiff in error, for the single act of carrying the box from the place in which it had been deposited by the trainmen on the platform at Brighton, across the platform and into the depot building, was convicted and fined one hundred dollars, under the section of the statute hereafter quoted. On appeal to the Supreme Court of Iowa, the judgment of conviction was affirmed.

The State v. *Rhodes*, 90 Iowa, 496.

The plaintiff in error sued out a writ of error from this court to the Supreme Court of the State of Iowa and brings the record here for review.

FIRST POINT.

THE CONSTRUCTION PUT BY THE STATE SUPREME COURT UPON THE STATE LAW, UNDER WHICH THE CONVICTION WAS HAD, MAKES THE LEGISLATIVE ACT OF THE STATE A REGULATION OF COMMERCE AMONG THE STATES.

The provision of the state statute under which plaintiff in error was convicted is as follows (Sec. 1553, Code of Iowa, ¶ 2410, McClain's Annotated Code of Iowa):

"If any express company, railway company, or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or if any other person shall transport or convey between points, or from one place to another within this State, for any other person or persons or corporation, any intoxicating liquors, without having first been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered, is authorized to sell such intoxicating liquors in such county, such company, corporation, or person so offending, and each of them, and any agent of said company, corporation, or person so offending, shall, upon conviction thereof, be fined in the sum of $100 for each offense and pay costs of prosecution and the cost shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete, and shall be held to have been committed in any county of the State, through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation, or in which said liquors are

conveyed from place to place or delivered. It shall be the duty of the several county auditors of this State, to issue the certificate herein contemplated, to any person having such permit, and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires as shown by the county records. *Provided* however that the defendant may show as a defense hereunder by preponderance of evidence that the character and circumstances of the shipment and its contents were unknown to him."

It will not be questioned that the shipment of the package from Dallas in the State of Illinois to Brighton in the State of Iowa on a through freight contract, was an inter-state shipment, and that the transaction, therefore, was commerce among the States.

The plaintiff in error was convicted as one of the agencies in the performance of this inter-state transaction. The Supreme Court of Iowa say (p. 502):

"Was the defendant, in the removal of the liquor, engaged in transporting or conveying it, within the meaning of our statute? The language of the statute is broad enough to cover the act of defendant in removing the liquor from the platform to the freight room of the depot. He was one of the instruments necessary to complete the act of transportation. If this be so, then, clearly, he is within the terms of the act, as he conveyed the liquor from 'one place to another within this state.' His guilt is not to be determined by the distance he conveyed the package, but his conveying it any distance was a violation of the law.

The carrying of the package, therefore, from the place on the platform in which it had been deposited from the train to the freight depot, is thus held to be in law, as indeed it is in fact, a part of the entire act of transportation. If the state law prohibited the performance of this part of the act of transportation, it is clear that in like manner it prohibited the carry-

ing of the package from Burlington, Iowa, to Brighton, Iowa, and from the Illinois-Iowa line to Burlington. If plaintiff in error, in the act which he performed, "conveyed the liquor from one place to another within this state," then, just as clearly, within the meaning of the law, did the Chicago, Burlington and Quincy Railroad Company and its employes, and the Burlington and Western Railroad Company and its employes "convey the liquor from one place to another within this state," by conveying it in the one case from the state line to Burlington, and in the other case from Burlington to Brighton. In other words, the state law, as here construed by the Supreme Court of the State, prohibited the carrying of this package containing intoxicating liquor, over any portion of the distance from the Illinois-Iowa state line to the freight depot in Brighton. That is, the law of Iowa stands at the boundary line between the two States and prohibits the transportation upon its soil, even for the space of six feet, of intoxicating liquors from the adjoining State, except for the persons whom the State itself has licensed to receive and sell such liquors. It is the act of transportation into the State that is prohibited and punished.

This construction of the state statute makes the Iowa law under which the present conviction was had identical with the statute of that State which was before this court in *Bowman* v. *Chicago and North-Western Railway Company*, 125 U. S., 465. Indeed, the statute that was before the court in that case was the same section under which the plaintiff in error was convicted. At the time of the transaction involved in the Bowman case, however, the section read:

"If any express company, railway company or any

agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or If any other person, *knowingly bring within this state* for any other person, or persons, or corporation, or shall knowingly transport or convey between points or from one place to another within this State, for any other person, or persons, or corporation, any intoxicating liquors," ,etc.

Sec. 10, Chap. 66, Laws Twenty-first General Assembly, Iowa.

Following the decision in the Bowman case (rendered March 19, 1888), the section was amended by omitting the words, "Knowingly bring within this State for any other person, or persons, or corporation." This omission left the statute in the form in which it existed when plaintiff in error was convicted under it. It is perfectly clear, however, that the construction put upon the amended statute by the decision in *State* v. *Rhodes* (90 Iowa, 496) has read these words again into the statute; and that the state law as it now stands, construed by the State Supreme Court, prohibits the transportation of intoxicating liquors into the State from another State. Thus construed the statute is palpably a regulation of commerce among the States. There may be said of it what was justly said of the same statute before its amendment, in the Bowman case.

"It is essentially a regulation of commerce among the States within any definition heretofore given to that term, or which can be given; and although its motive and purpose are to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce."

The question presented on this record, therefore, would

be the precise question presented in *Bowman* v. *Railway Company*, if it were not for the passage by Congress of the Wilson Bill in 1890.

SECOND POINT.

IT WAS NOT THE INTENT OF THE WILSON BILL TO PERMIT THE ENFORCEMENT OF A STATE LAW WHICH PROHIBITS THE TRANSPORTATION OF INTOXICATING LIQUORS INTO THE STATE FROM ANOTHER STATE.

The language of the Wilson Bill is as follows: "All fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory be subject to the operation of the laws of such State or Territory enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Plaintiff in error contends that the words in this act "upon arrival in such State or Territory," as applied at least to an act of transporation, necessarily imply arrival at the ultimate destination of the shipment. The contrary construction put upon the federal act by the Supreme Court of the State of Iowa is, of course, not binding upon this Court. The argument to sustain the contention of plaintiff in error in this behalf is sufficiently set forth in the brief of other counsel, and will not be elaborated here.

THIRD POINT.

IF IT IS THE INTENT OF THE WILSON BILL TO PERMIT THE ENFORCEMENT OF STATE LAWS WHICH PROHIBIT THE TRANSPORTATION OF INTOXICATING LIQUORS INTO THE STATE FROM OTHER STATES, THEN THE WILSON BILL, AS APPLIED TO THE PROVISION OF THE LAW HERE IN QUESTION AND TO A TRANSACTION LIKE THE PRESENT, IS IN EXCESS OF CONGRESSIONAL POWER.

This proposition does not necessarily question the correctness of the ruling in *In re Rahrer*, 140 U. S., 545. The effect of that holding was to assert the power of Congress to permit the enforcement of state laws which regulated or prohibited the first sale of intoxicating liquors brought into the State from other States. It had never been the law in this country until the decision in *Leisy* v. *Hardin*, 135 U. S., 100, that the right to sell any commodity transported into a State from another State was a necessary incident of the right of importation. Indeed, although *Brown* v. *Maryland*, 12 Wheat., 419, had affirmed the right of an importer from a foreign country to sell an imported commodity in its original package free from any regulation or prohibition by the States, *Pierce* v. *New Hampshire*, 5 How., 504, had established exactly the opposite rule with reference to commodities transported into a State from a sister State; and this rule had remained undisturbed until the decision in the Leisy case, only three months prior to the passage of the Wilson bill. The sole effect of the Wilson bill, as construed in Rahrer's case, was to restore the *status quo* which existed before the Leisy decision, and to permit the enforcement of state laws, enacted in the exercise of

their police powers, to regulate or prohibit the original sale of intoxicating liquors transported into the State from other States.

The application of the Wilson bill to the case at bar, would have a farther reach and broader scope. It would permit the enforcement of state laws which have for their object to regulate and prohibit the transportation of intoxicating liquors into the State from other States. It is to be noted that neither the Iowa laws nor the Wilson Bill detract in the least from the established character of intoxicating liquors as legitimate articles of commerce. The Iowa laws do not prohibit the use of, or the traffic in, intoxicating liquors; they merely regulate such traffic and use. It may be said of the Iowa laws, as was said of the Dispensary Act of South Carolina in *Scott v. Donald*, 165 U. S., 58, 93, "Liquors and wines are recognized as commodities which may be lawfully made, bought and sold, and must therefore be deemed to be the subject of foreign and interstate commerce." A federal act which permits the enforcement of state laws having for their object the regulation and prohibition of the importation of one legitimate article of commmerce, might as well extend its sanction to the enforcement of state laws regulating and prohibiting the transportation into the State of any and all commercial commodities. The language of Mr. Chief Justice MATTHEWS in the Bowman case is apposite here (125 U. S. at p. 494):

"If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to estab-

lish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select, as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States."

The proposition that I here assert, therefore, is, that Congress has no power to permit the enforcement by the State of Iowa of its laws designed to prohibit the importation of legitimate articles of commerce from other states.

"Mr. Chief Justice MARSHALL, in *Gibbons* v. *Ogden* (9 Wheat., at p. 211), said:

"In pursuing this inquiry at the bar, it has been said that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right and gave to Congress the power to regulate it."

A power to prohibit the interchange between the States of recognized articles of legitimate commerce would be a power to destroy this right of intercourse which existed before the Constitution. It is not conceivable that Congress, itself, under its power to regulate, could prohibit commerce among the States; much more is it beyond conception that Congress could permit the enforcement of State laws which have that effect. The Rabrer decision announces no such rule.

The long conflict as to the proper construction of the commerce clause of the Constitution, was, until the decision in *Cooley* v. *Board of Wardens*, 12 How., 299, fought around the single question whether the Federal power over commerce was exclusive, or concurrent with a like power in the States. The sole exception to this rule among the cases which preceded the Cooley case was *New York* v. *Miln*, 11 Pet., 102, where the majority opinion was placed upon the proposition that State laws, passed in the exercise of the police powers of the States, were to be held valid even though in their operation they regulated or impeded commerce. This proposition, savagely assailed by Mr. Justice Catron in *The License Cases*, fought without success for recognition in subsequent cases, and was finally put at rest by the decision in *Bowman* v. *Chicago and North-Western Railway Company*. In all the other cases preceding the Cooley case, the issue was as to the exclusiveness or the concurrency of the Federal power. In *Cooley* v. *Board of Wardens*, 12 How., 299, this long controversy was finally set at rest by a compromise which asserted as a definite rule of decision, that as to subjects national in their nature and requiring one uniform system or plan of operation the Federal power over commerce is exclusive, and that as to subjects local in their nature, such as the subject of pilotage under consideration in that case, the Federal power over commerce was concurrent with a like power in the States, which the latter might exercise until Congress itself should regulate the subject. This great compromise has never been formally repudiated, and remains the established rule of decison to-day.

It has ever been the holding of this court that the subject of the interstate transportation of articles of commerce is a subject national in its nature, and therefore falling for regulation within the exclusive power of Congress.

Case of State Freight Tax, 15 Wall., 232; *Wabash, &c., Railway Company* v. *Illinois*, 118 U. S., 557; *Bowman* v. *Chicago and North-Western Railway Company*, 125 U. S., 465.

What is meant by the exclusive power of Congress is well expressed in the language of some of the justices who have been ardent advocates of the exclusive theory. Said Mr. Justice JOHNSON in his separate opinion in *Gibbons* v. *Ogden*, in which he protested that the judgment in that great case should be given on the ground of the exclusiveness of the Federal power, instead of on the ground that the state law granting to Livingston and Fulton the exclusive right of navigation by steam on the navigable waters of the State of New York was in conflict with the laws of Congress regulating the coasting trade:

"And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside in but one potentate: and hence the grant of this power carries with it the whole subject, leaving nothing for the state to act upon."

Gibbons v. *Ogden*, 9 Wheat., at p. 227.

Mr. Justice STORY, in his despairing protest against the retrogressive tendency of the reconstructed court as evidenced by the novel decision in *New York* v. *Miln*, said:

"If the act is a regulation of commerce and that subject belongs exclusively to Congress, it is a means cut off from the range of state sovereignty and state legislation."

Mr. Justice MATTHEWS, in *Smith* v. *Alabama*, 124 U. S., 465, 473, said:

"In such cases the existence of the power to regulate commerce in Congress, has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States."

From these definitions it is clear that the conception of the theory of exclusive Federal power over commerce involves the idea of ample and plenary power on the part of Congress, and of *absolute want of power on the part of the States.* If subjects requiring one uniform system or plan of regulation are to be regulated at all, it must be by act of Congress; the subject is entirely removed beyond the reach of the legislative power of the States.

This conception of the nature of the exclusive Federal power, was universally understood and received until unfortunate expressions in the opinions in the Bowman and Leisy cases disturbed it. In the Bowman case Mr. Justice Matthews had said:

"So far as these regulations (certain acts of Congress concerning transportation) made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, *or by the States in particular cases by the express permission of Congress.*" (p. 485.) * * * It (a State) cannot, *without the consent of Congress*, express or implied, regulate commerce between its people and those of the other States of the Union." (p. 493.)

Mr. Chief Justice FULLER quoted these suggestions in his opinion in *Leisy* v. *Hardin*, and thus re-inforced them in his own language:

"Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be

governed by a uniform system, so long as Congress does not pass any law to regulate it, *or allowing the States so to do*, it thereby indicates its will that such commerce shall be free and untrammeled. That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, *in the absence of legislation on the part of Congress*, prohibit their importation from abroad or from a sister State? or, when imported, prohibit their sale by the importer? If the importation cannot be prohibited *without the consent of Congress*, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control? (pp. 109, 110.) * * *

The conclusion follows that, as the grant of power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power *without the assent of Congress*, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise, or in other words, what is or is not a regulation of such commerce. (p. 119.) * * * Up to that point of time (the first sale in original package) we hold that *in the absence of Congressional permission to do so*, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. (p. 124.) * * * To concede to a State the power to exclude, directly or indirectly, articles so situated *without Congressional permission*, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create." (p. 125.)

These are, I believe, the first and the only suggestions in the books that Congress might permit the States to regulate interstate or foreign commerce. These suggestions undoubtedly inspired the passage of the Wilson Bill, which found its way through Congress within three months after the Leisy case had been decided. The opinion in *Scott* v. *Donald*, 165 U. S., 58, recognizes this probability. "After the decision in *Leisy* v. *Hardin*" says the opinion (p. 98), "and perhaps in pursuance of some observations contained therein, Congress passed the act of August 8, 1890" (the Wilson Bill).

Although the quoted suggestions in the Bowman and Leisy opinions that Congress might permit the States to enact laws amounting to regulations of interstate commerce, were thus undoubtedly responsible for the passage of the Wilson bill, the validity of that enactment could not, of course, be upheld on that ground. It had been too often declared that Congress could not give a right to a State in virtue of its own powers, or enable a State to legislate (MARSHALL, Ch. J., in *Gibbons* v. *Ogden*); or restore to the States the power of which they were deprived in the commerce clause (TANEY, Ch. J., in *The License Cases*); or delegate to a State power to pass an act amounting to a regulation of interstate commerce. (*Stoutenburgh* v. *Hennick*, 129 U. S., 141.) The doctrine which had cropped out inadvertently in the Bowman and Leisy cases, that Congress might permit the States to regulate interstate commerce was, therefore, repudiated. But the reasoning which, in Rahrer's case, upheld the Wilson Bill as a valid exercise of Congressional power, as applied to the state law there in question (a law regulating the sale of imported articles after they had reached their destination within the State), cannot, I submit, justify the Wilson

Bill as applied to the law here in question, a law prohibiting the transportation of legitimate articles of commerce into the State.

The theory of the Rahrer opinion is, not that the States lack power to regulate the subject of the sale of imported articles, but that the will of Congress (implied from the absence of Congressional regulation on the subject), that the subject should be free from regulation, prevents the enforcement of the state laws.

Early in the opinion it is said:

"The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. The constitution does not provide that inter-state commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states."

Citing:

Robbins v. *Shelby Taxing District*, 120 U. S., 489.

This is but a restatement of a proposition that is as old as the earliest discussion of the commerce clause. Mr. WEBSTER, in his argument in *Gibbons* v. *Ogden*, had said:

"All useful regulation does not consist in restraint; and that which Congress sees fit to leave free is a part of its regulation as much as the rest."

Webster was arguing for the establishment, in *Gibbons* v. *Ogden*, of the doctrine of exclusive Federal power over the entire subject of inter-state and foreign commerce. His meaning was that the power of Congress

covered the entire subject, excluding altogether any power in the States; and that the States were just as impotent to regulate a subject which Congress by its silence meant should be free from regulation, as they were powerless to regulate another subject which Congress by express act had subjected to regulation. So MARSHALL understood the argument:

"Appellant," he said, * * * "contends that full power to regulate a particular subject implies the whole power and leaves no residuum; that the grant of the whole is incompatible with the existence of a right in another to any part of it." * * *

It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted."

Gibbons v. *Ogden*, 9 Wheat., at pp. 198, 209.

Such was the meaning of Mr. Justice GRIER, who next used the idea in his opinion in *The Passenger Cases:*

"And to what weight," he says, "is that argument entitled, which assumes, that because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases? * * * In conclusion, we are of opinion * * * 4th, that Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free, and it is therefore not left to the discretion of each State in the Union, either to refuse the right of passage

to a person or property through her territory, or to exact a duty for permission to exercise it."

The Passenger Cases, 7 How., at pp. 462, 3, 4.

Such, finally, was the spirit in which Mr. Justice FIELD formulated the principle in *Welton* v. *Missouri*, 91 U. S., 275:

"The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its action on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

A new inference was drawn in the Rahrer decision from this accepted statement of a palpable truth (p. 559):

"The laws of Iowa under consideration in *Bowman* v. *Railway Company*, 125 U. S., 465, and *Leisy* v. *Hardin*, 135 U. S., 100, were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of the imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character and must be governed by a uniform system, so long as Congress did not pass any law to regulate it specifically or in such way as to allow the laws of the State to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammeled, and therefore that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, or their sale upon arrival, in the form in which they were imported there from a foreign country or another State. It followed as a corollary, that when Congress acted at all, the result of

its action must be to operate as a restraint upon that perfect freedom which its silence insured.

Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature."

Here is a plain implication that the perfect freedom of interstate commerce from regulation by the States is insured, not by the impotency of the States to enact regulations on the subject, but by the will of Congress, implied from its silence; and that state regulation of such commerce is possible whenever a change in the will of Congress is expressed in a Federal act. I do not quarrel with this proposition in its application to the facts of the Rahrer case. The scope of its influence is expressed in the next following language of the opinion (p. 562):

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

In other words, the effect of the Wilson bill, as applied to the Kansas law in question in the Rahrer case, was merely to declare that the traffic in intoxicating liquors ceased to be interstate commerce immediately *before*, instead of immediately *after* the first sale in the original package. That such a declaration is within the competency of Congress, may well be; but that Congress may declare that the transportation from State to State of legitimate articles of commerce ceases to be interstate commerce at the boundary line of the State into which they are to be transported, is quite another question. The reasoning that reached the conclusion announced in the Rahrer case does not reach this farther mark.

The subject of the interstate transportation of property, we repeat, has been adjudged to be of such a national nature as to admit of regulation only by the exclusive power of Congress. Such regulation, in the language of Mr. Justice MILLER, "can only appropriately exist by "general rules and principles, which demand that it should "be done by the Congress of the United States under the "commerce clause of the constitution."

Wabash, &c., Railway Co. v. *Illinois*, 118 U. S., p. 577.

The perfect freedom of this subject of interstate commerce from such a regulation as the Iowa law here in review is insured, not by the silence of Congress on the subject, but by the absolute impotency of the State to enact such a regulation. Whether Congress was silent or not, the State, by the commerce clause of the constitution, had been absolutely divested of any power over this subject of commerce, which, being national in its nature, required "one uniform system or plan of regula-"tion." The subject was removed, in the language of *Smith* v. *Alabama*, "as the basis of legislation altogether from the States."

The effect of the silence of Congress upon such a subject was only to indicate its will that commerce in that particular should be free from any regulation—not free from regulation by the States, for the States had no power at all to regulate the subject.

Indeed, the formulation of the doctrine that the silence of Congress was an indication of its will that commerce should be free from regulation, was never necessary or designed for the purpose of declaring void an attempted regulation by the States upon such a subject. Without

reference to the silence of Congress, the attempt of the States to enact a law upon such a subject would be void because the subject was removed beyond the range of the legislative power of the States.

The proper use of this doctrine of the silence of Congress, is indicated in *Hall* v. *DeCuir*, 95 U. S., 485. We quote from the opinion of Mr. Chief Justice WAITE (p. 490):

"As was said by Mr. Justice FIELD, speaking for the court, in *Welton* v. *State of Missouri*, 91 U. S., 282, 'inaction (by Congress) * * * is equivalent to a declaration that inter-state commerce shall remain free and untrammeled.' Applying that principle to the circumstances of this case, Congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation it must come from Congress and not from the States."

In other words the true meaning of the doctrine of the silence of Congress is, that absence of regulation by Congress upon subjects national in their nature and subject therefore only to regulation under the exclusive power of Congress, is an indication, not to the States, but to the parties engaged in foreign and inter-state commerce, that as to those subjects, inter-state and foreign commerce is free and untrammeled. The silence of Congress indi-

cates its policy that as to those subjects of commerce, the persons engaged in them shall regulate it themselves. It imputes nothing as to power or absence of power on the part of the States. It raises no new barrier against state regulation, for the reason that an absolute and insuperable barrier against such regulation upon such subjects is erected by the provision of the Federal Constitution, as construed in *Cooley v. Board of Wardens*, which confides the regulation of such subjects solely to the exclusive power of Congress.

To say that the silence of Congress upon those subjects is an indication to the States that they must not regulate those subjects, but that when the silence is removed, the States may regulate them, is to admit the existence of the power to regulate such subjects on the part of the States. Such is the clear statement of the Rahrer decision as to the subject there under consideration.

"Congress did not use terms of permission to the States to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the States not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

This position, I concede again, may be perfectly sound as applied to the facts of Rahrer's case. The State of Kansas undoubtedly had the power to prescribe regulations for the sale of intoxicating liquors within the State, and it was probably competent for Congress to provide that liquors brought into the State from other States should become subject to the state regulations before, instead of after, the first sale. But the State of Iowa, in declaring that a common carrier shall not transport a legitimate article of commerce into the State (and this is the meaning

of the state law here in question, as construed by the Iowa Supreme Court), was enacting a regulation of interstate commerce upon a subject national in its nature, and, therefore, subject to regulation only under the exclusive power of Congress. In so doing, it was legislating upon a subject "cut off from the range of state sovereignty and state legislation." The conception of the exclusiveness of the Federal power necessarily involves the idea that any state legislation attempting to exercise that power is void, not as being in conflict with the will of Congress, express or implied, but as an attempted exercise of power of which the States under the Federal Constitution are totally divested. A subject which requires exclusive legislation by Congress cannot admit of any legislation by the States; and this is so, whether Congress has or has not legislated on the subject.

The Iowa law, then, was void *ab initio* for want of power in the State to pass it. Such was the ruling in *Bowman* v. *Railway Company*. If the law now has any force, it is conceded that it is only by virtue of the Wilson Bill. If the Wilson Bill was intended to permit the enforcement of such a law, it becomes clearly an effort on the part of Congress to give efficacy to a pretended law which the State had no power to pass. That Congress cannot authorize a State to enact such a regulation of commerce has been adjudged.

Gibbons v. *Ogden*, 9 Wheat., 1.
The License Cases, 5 How., 504.
Cooley v. *Board of Wardens*, 12 How., 299.
Stoutenburgh v. *Hennick*, 129 U. S., 141.

That Congress could subsequently authorize the en-

forcement of an act thus clearly beyond the power of the State to pass, is a proposition the refutation of which requires no argument.

The *Rahrer* case is clearly distinguished from the case at bar by the concluding sentences of the opinion. It is said:

"This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress."

This statement certainly cannot be made of the Iowa law under which the present conviction was secured. *Bowman* v. *Railway Company* is express authority for the proposition that the Iowa law, as construed in the opinion of its Supreme Court, is "an unauthorized interference with the power given to Congress over the subject." This, then, *is* "the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress." Congress is without power to vivify this act of the State which was, in the beginning, beyond its authority to enact, and if the Wilson Bill is designed to accomplish that task, it is, in turn, an act in excess of Congressional power.

No other conclusion is possible unless the salutary line of distinction between the fields of exclusive and concurrent power, so clearly marked in *Cooley* v. *Board of Wardens*, and hitherto followed, is to be wholly obliterated and the theory of exclusive Federal power to be finally cast aside. To hold that only the silence of Congress prevents the enforcement of State regulations of subjects of interstate commerce national in their nature, is to hold that the States have power to en-

act such regulations, the occasion of their enforcement only depending upon the Congressional will. This is a fair statement of the theory of concurrent power, under which, according to the Cooley case, the States may regulate subjects of a local character. The only difference is that upon local subjects the state regulations may be enforced until displaced by Federal regulations; while upon national subjects the state regulations may not be enforced until Congress gives its consent. In both cases state power to legislate exists, the occasion of its exercise only depending on the will of Congress.

This leaves it within the power of Congress, without an amendment of the constitution, to permit the enforcement of the diverse regulations of the States upon every possible subject of interstate commerce. Already a bill, in the image of the Wilson Bill, has passed the House and is pending in the Senate, which surrenders oleomargarine to state regulation. Every other commodity, the commerce in which affects injuriously special interests or particular localities, may become as likely a candidate as oleomargarine for similar congressional distinction, and eventually each State, in proportion to its influence and power in Congress, may secure the passag of laws which would permit it to regulate or prohibit the importation and sale of any commodity which might be deemed harmful to the health or morals of the commonwealth or inimical to its industrial growth or welfare. Judicial construction of the commerce clause which leads to such a possibility but invites a recurrence of "the oppressed and degraded state of commerce previous to the adoption of the constitution" which more than "any of the evils proceeding from the feebleness of the Federal government, con-

tributed to that great revolution which introduced the present system." MARSHALL, Ch. J., in *Brown* v. *Maryland*.

The power confided to Congress in the commerce clause is the power to regulate commerce, not to permit its regulation by the States. It is impossible that any act passed by Congress in pursuance of the commercial power should prescribe anything but "one uniform system or plan of regulation." A Federal law is beyond conception which should declare that the transportation and sale of oleomargarine should be lawful in Missouri and unlawful in Massachusetts, or that a common carrier should be compelled in Illinois to receive intoxicating liquors for transportation into Iowa and punished in Iowa for the performance of the act enforced in Illinois. Yet, inconceivable as it is that Congress should itself pass such a law, it has, if the Wilson Bill authorizes the enforcement of the Iowa law under which this conviction was had, vitalized state laws which have, as to intoxicating liquors, precisely that effect. Such a recognition of state laws upon a subject, the regulation of which was entrusted solely to Congress for the express reason that in its nature it requires "one uniform system or plan of regulation," is essentially a restoration to the States of that sovereign power of regulation, the diverse exercise of which produced the commercial anarchy and confusion that reigned during the Confederation.

It is submitted that such sanction cannot be given to the state law here in controversy, and that the judgment of conviction should be reversed.

Respectfully submitted.

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